

No. 89-985

FILED  
FEB 20 1990

JOSEPH F. SPANIEL, JR.  
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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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JUSTO ENRIQUE JAY, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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KENNETH W. STARR  
*Solicitor General*

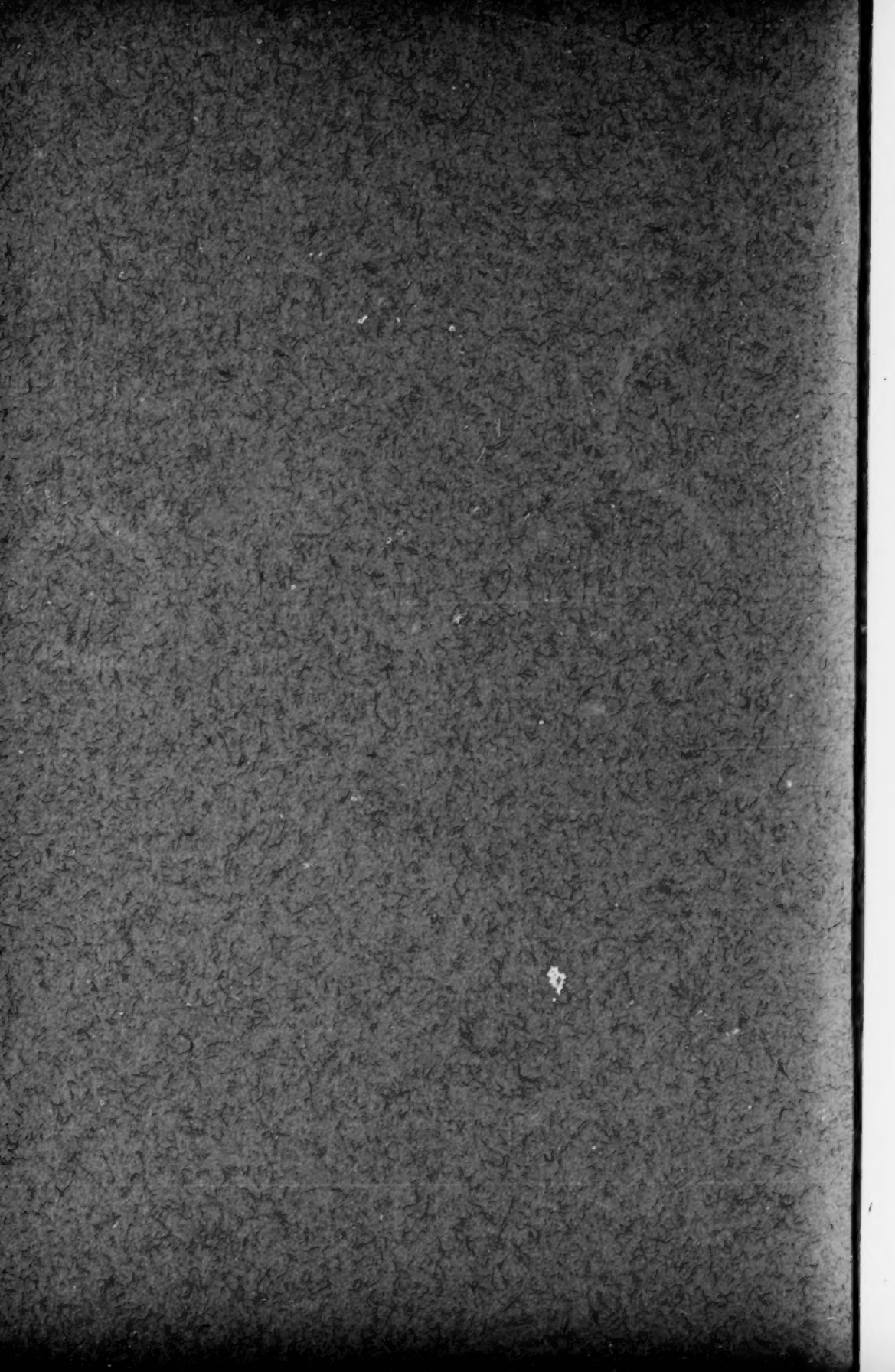
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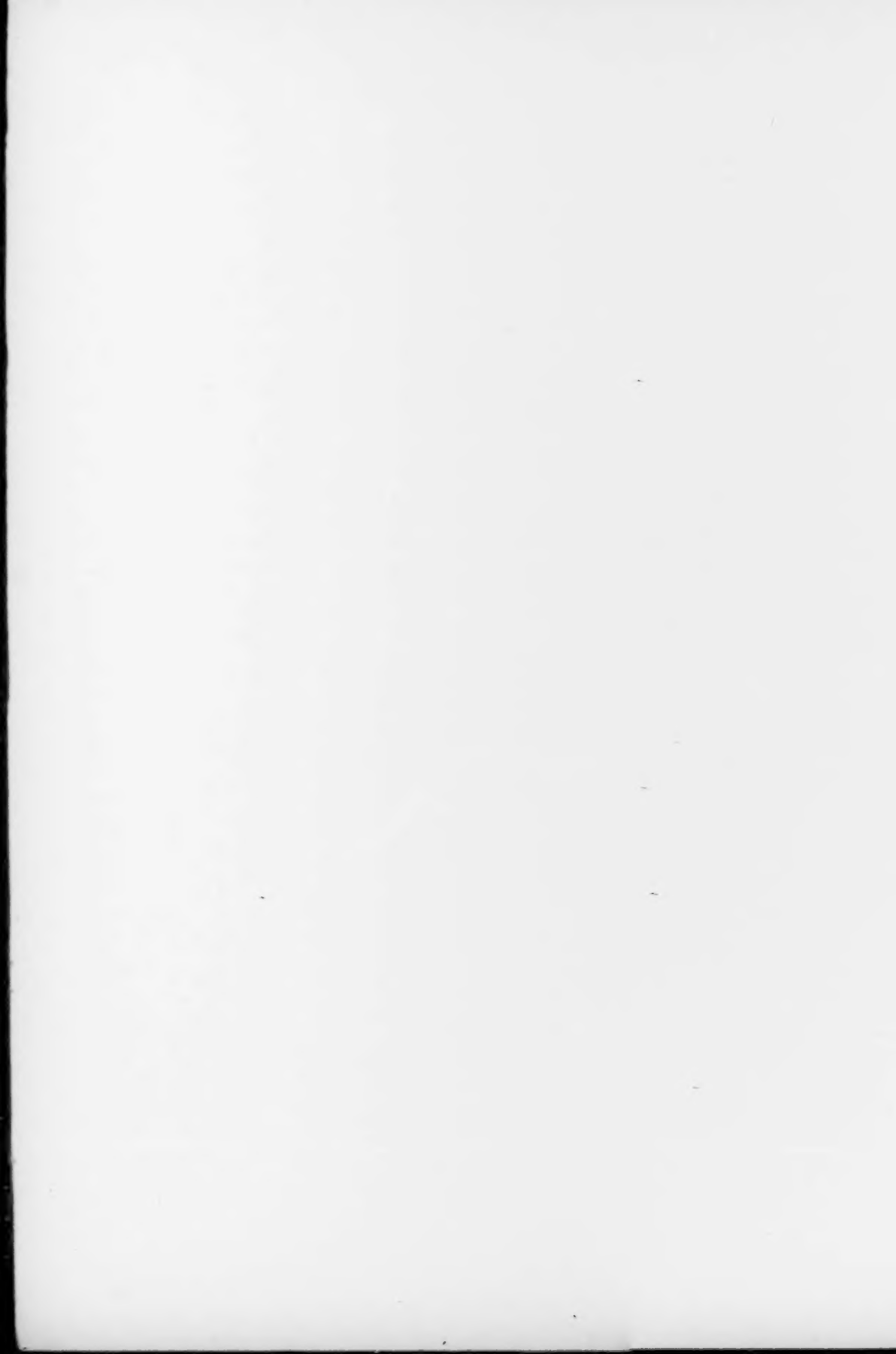
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## **QUESTIONS PRESENTED**

1. Whether a count charging that petitioner operated a continuing criminal enterprise (CCE), which tracked the language of the statute but did not set out the series of drug violations on which the charge was based, was defective even though petitioner had actual notice of the drug violations comprising the series.

2. Whether petitioner's CCE conviction must be reversed because the district court did not instruct the jury that it was required to agree unanimously on the offenses comprising the continuing series of violations, where petitioner was also convicted on 14 substantive drug counts.



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## **OPINION BELOW**

The per curiam opinion of the court of appeals (Pet. App. 1a-9a) is reported at 887 F.2d 1081.

## **JURISDICTION**

The judgment of the court of appeals was entered on September 21, 1989. A petition for rehearing was denied on October 19, 1989 (Pet. App. 102). The petition for a writ of certiorari was filed on December 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was

convicted on 14 counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a); one count of conspiring to commit that offense, in violation of 21 U.S.C. 846; and one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. He was sentenced to life imprisonment without possibility of parole on the CCE count and to consecutive sentences totalling 115 years on the remaining counts. The court of appeals vacated the sentence on the conspiracy count because it had held in *United States v. Lurz*, 666 F.2d 69, 81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982), that a Section 846 conspiracy is a lesser included component of a Section 848 CCE offense. The court affirmed in all other respects. Pet. App. 1a-9a.

The evidence, which is summarized in the opinion of the court of appeals, showed that petitioner "was one of the leaders of a major drug distribution network operating on the eastern coast of the United States" from 1979 through 1984. Pet. App. 6a. Petitioner and his partner, who were based in Miami, Florida, regularly supplied their underlings with cocaine for transportation to Charlotte, North Carolina, and other eastern cities. *Id.* at 7a.

Petitioner was indicted on the CCE charge in February 1988. Five weeks later, he was indicted by a different grand jury on the conspiracy count and on 14 substantive counts alleging distribution of cocaine. Prior to trial, petitioner moved for a bill of particulars on the CCE count. He also moved to dismiss the indictment on the grounds that (1) it failed to provide him with notice of the specific transactions alleged to comprise the "continuing series" element of the CCE offense, and (2) it failed to safeguard his right to be tried only for offenses charged by the grand jury. The district court ordered the government to file a bill of particulars specifying the continuing series of violations, and the government responded that it would rely specifically on



the 14 substantive counts charged in the second indictment. In addition, the bill of particulars listed other alleged violations on which the government stated it would "rely generally." The district court subsequently denied the motion to dismiss. Pet. App. 2a-3a.

On appeal, petitioner contended that the indictment was defective because it failed to specify the predicate drug violations alleged to comprise the "continuing series" element of a CCE offense. In rejecting that claim, the court of appeals held (Pet. App. 4a) that a CCE charge need not enumerate the predicate offenses relied on by the government so long as it tracks the language of the CCE statute. The court added (*id.* at 5a) that petitioner had received adequate notice through the bill of particulars and the second indictment of the predicate offenses that would be proved at trial. The court of appeals also rejected (*id.* at 6a n.3) petitioner's claim that the district court erroneously failed to instruct the jury that, in order to convict him on the CCE count, it had to agree unanimously on the offenses comprising the continuing series of violations.

### ARGUMENT

1. Petitioner renews his contention (Pet. 10-22) that the CCE count was deficient because it failed to allege the specific drug offenses that comprised the continuing series of violations under the CCE statute. Specifically, he argues that even if the bill of particulars and the second indictment were sufficient to give him notice of the predicate offenses underlying the CCE charge, they were not sufficient to protect his right to be tried and convicted only on the basis of facts found by the grand jury that returned that charge.

The courts below properly rejected petitioner's contention. "[I]n order to support a § 848 charge, the government is not required to plead in any form \* \* \* any of the eligi-

ble predicate offenses, but may instead simply prove at trial the continuing series of offenses.” *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985). This rule is consistent with the general principle that indictments need only “track the language of a statute and, in addition, do little more than state time and place in approximate terms.” *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974). See also *Hamling v. United States*, 418 U.S. 87, 117 (1974). In this case, the CCE count was entirely adequate, since it alleged that petitioner had managed an enterprise that regularly distributed cocaine in North Carolina from 1978 through 1984. Pet. App. 4a n.2.

No court has reversed a CCE conviction because of the failure of the indictment to specify the predicate drug violations where the CCE count tracked the language of the statute and the defendant had actual notice of the predicate offenses. See, e.g., *United States v. Staggs*, 881 F.2d 1527 (10th Cir. 1989) (en banc), cert. denied, No. 89-549 (Jan. 8, 1990); *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1411 (11th Cir. 1989), petition for cert. pending, No. 89-6279; *United States v. Moya-Gomez*, 860 F.2d 706, 751-752 (7th Cir. 1988), cert. denied, 109 S. Ct. 3221 (1989); *United States v. Becton*, 751 F.2d 250, 256-257 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States v. Sterling*, 742 F.2d 521, 526 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States v. Johnson*, 575 F.2d 1347, 1356 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975). In this case, the CCE count tracked the language of the statute, and the bill of particulars gave petitioner clear notice of the predicate offenses on which the government would rely. Moreover, since the predicate offenses were set out in the second in-

dictment, petitioner was not convicted on the basis of allegations not approved by a grand jury.

Contrary to petitioner's contention (Pet. 10-16), *Russell v. United States*, 369 U.S. 749 (1962), and *Stirone v. United States*, 361 U.S. 212 (1960), do not require reversal. The defendants in *Russell* were charged with violating 2 U.S.C. 192, which prohibits the refusal to answer questions pertinent to a subject under inquiry by a congressional committee. The Court held that an indictment alleging a violation of Section 192 must state the subject under inquiry by the congressional committee, lest it leave "the chief issue undefined." 369 U.S. at 766. The defendant in *Stirone* was charged with violating 18 U.S.C. 1951, which prohibits extortionate interference with interstate commerce. The Court held that it constituted an impermissible amendment of an indictment alleging a violation of Section 1951 for the trial court to allow the jury to find the defendant guilty on a determination that he had interfered with the shipment of *steel out* of Pennsylvania when the indictment charged him with obstructing the movement of *sand into* Pennsylvania. In this case, in contrast, the chief issue was not undefined and the government's proof at trial did not amend the allegations in the indictment: the indictment informed petitioner that he was charged with operating an enterprise that distributed cocaine in North Carolina between 1978 and 1984, the bill of particulars and the second indictment further defined the allegations, and the evidence at trial proved those offenses, not others.

2. Petitioner also contends (Pet. 22-28) that the district court erred by failing to instruct the jury that, in order to convict him on the CCE count, it had to agree unanimously on the offenses comprising the continuing series of violations. Petitioner contends that review is warranted primarily because the Third Circuit held in *United States v. Echeverri*, 854 F.2d 638, 642-643 (1988), that the trial court's refusal

to give a specific unanimity charge was reversible error. This case, however, is very different from *Echeverri*. In that case, the defendant was not charged with a series of counts alleging substantive drug distribution offenses, although the evidence purported "to show numerous alleged violations." 854 F.2d at 643. In that circumstance, the court stressed that "there is no assurance that the jury unanimously agreed that the same three narcotics violations occurred." *Ibid*. In this case, in contrast, the second indictment set forth the predicate offenses on which the government relied and the jury convicted petitioner on each of the 14 substantive drug counts charged in that indictment. Thus, the jury in this case reached unanimous agreement on at least three predicate offenses underlying the CCE charge. Therefore, this case is comparable to *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1572 (9th Cir. 1989), where the court distinguished *Echeverri* on the ground that in *Hernandez-Escarsega* there was "no question of juror unanimity" with respect to the predicate offenses underlying the CCE charge. Since there is no question of juror unanimity, there is no warrant for further review.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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FEBRUARY 1990

